

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN S. AND JANET B. TAMAGNI	:	DETERMINATION
	:	DTA NO. 811237
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Years 1987 through 1989.	:	

Petitioners, John S. and Janet B. Tamagni, c/o Lazard Freres and Co., One Rockefeller Plaza, New York, New York 10020, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1987 through 1989.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 28, 1993 at 9:15 A.M., and continued to completion at the same location on September 29, 1993 at 8:30 A.M., with all briefs to be submitted by February 4, 1994. Petitioners' brief was received on December 6, 1993. The answering brief of the Division of Taxation was received on January 12, 1994, and petitioners' reply brief on August 2, 1994.¹ Petitioners appeared by Morrison & Foerster, Esqs. (Arthur R.

Rosen, Esq., Craig B. Fields, Esq., and Judith E. Lansky, Esq., of counsel). The Division of

¹By a letter dated July 27, 1994, the Administrative Law Judge requested that petitioners submit another copy of their reply brief since it appeared that a transmittal letter dated February 2, 1994 indicating that a reply brief was enclosed, in addition to proposed findings of fact and conclusions of law, transmitted only the proposed findings of fact and conclusions of law.

Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

ISSUES

I. Whether petitioners have established that they were not present in New York State and City for more than 183 days during each of the years at issue and therefore were not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

II. Whether, if petitioners were taxable as nonresidents only, the Division of Taxation may amend its answer to assert that additional tax would still be due based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., of which petitioner John S. Tamagni was a partner.

III. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision is unconstitutional as applied to petitioners under the so-called "internal consistency test" because they would be taxed more than once on their intangible income.

IV. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision as applied to petitioners violates Section 3 of Article XVI of the New York State Constitution by taxing their income from intangibles not employed in a New York business.

V. Whether petitioners have established that negligence penalties should be abated.

VI. Whether the submission of personal notes of petitioners' representative to show that the transcript was in error after the completion of the hearing was improper.

FINDINGS OF FACT

The Division of Taxation ("Division") issued three statements of audit changes each dated March 3, 1992 against petitioners, John S. and Janet B. Tamagni, showing income tax due

of \$64,115.51 plus penalty² and interest for 1987, \$70,353.28 plus penalty and interest for 1988, and \$58,072.43 plus penalty and interest for 1989, respectively.

The statement for 1987 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		\$1,880,952.00
Audit increases to N.Y. State income		
Interest income	\$97,460.00	
Dividend income	34,488.00	
New York additions	23,698.00	
Audit decreases to N.Y. State income		
Rents & royalties	19,170.00	
Partnerships	31,616.00	
New York subtractions	<u>20,847.00</u>	
Net adjustments to N.Y. State income		<u>84,013.00</u>
Corrected adjusted gross income		\$1,964,965.00
Less: Itemized deductions per return		220,468.00
Four exemptions		<u>3,600.00</u>
Corrected N.Y. State taxable income		\$1,740,897.00

The 1987 statement showed a "corrected tax liability" of \$150,695.74 for New York State income tax and of \$70,688.77 for New York City income tax and "additional tax liability" of \$6,512.74 for New York State income tax and of \$57,602.77 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$144,183.00 and \$13,086.00, respectively).

The statement for 1988 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		\$2,181,112.00
Audit increases to N.Y. State income		
Interest income	\$ 39,647.00	
Dividends	37,606.00	
Partnerships	24,674.00	
New York additions	161,853.00	
Audit decreases to N.Y. State income		
Capital gains	40,600.00	
Other losses	141.00	
New York subtractions	<u>91,120.00</u>	
Net adjustments to N.Y. State income		<u>131,919.00</u>

²The Division asserted negligence penalties under Tax Law § 685(b) for each of the three years at issue.

Corrected adjusted gross income		\$2,313,031.00
Less: Itemized deductions per return		228,991.00
N.Y. itemized deduction adjustment		<u>45,798.20</u>
Corrected itemized deductions after modification	\$ 183,192.80	
Two exemptions		<u>2,000.00</u>
Corrected N.Y. State taxable income		\$2,127,838.20

The 1988 statement showed a "corrected tax liability" of \$177,334.95 for New York State income tax and of \$74,029.33 for New York City income tax and "additional tax liability" of \$10,320.95 for New York State income tax and of \$60,032.33 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$167,014.00 and \$13,997.00, respectively).

The statement for 1989 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		\$1,877,063.00
Audit increases to N.Y. State income		
Interest income	\$ 31,665.00	
Dividend income	48,088.00	
Capital gain income	47,356.00	
New York additions	127,839.00	
Audit decreases to N.Y. State income		
Taxable refunds	21,989.00	
Partnerships	105,371.00	
New York subtractions	<u>78,768.00</u>	
Net adjustments to N.Y. State income		<u>48,820.00</u>
Corrected adjusted gross income		\$1,925,883.00
Less: Itemized deductions per return		231,909.00
N.Y. itemized deduction adjustment		<u>115,954.50</u>
Corrected itemized deductions after modification	\$ 115,954.50	
Two exemptions		<u>2,000.00</u>
Corrected N.Y. State taxable income		\$1,807,928.50

The 1989 statement showed a "corrected tax liability" of \$141,656.87 for New York State income tax and of \$61,141.56 for New York City income tax and "additional tax liability" of \$7,733.87 for New York State income tax and of \$50,338.56 (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of \$133,923.00 and \$10,803.00, respectively).

In sum, the three statements of audit changes assert the following tax liabilities against petitioners:

<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>Total</u>
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New York State income tax	\$ 6,512.74	\$10,320.95	\$ 7,733.87	\$ 24,567.56
New York City income tax	<u>57,602.77</u>	<u>60,032.33</u>	<u>50,338.56</u>	<u>167,973.66</u>
Totals	\$64,115.51	\$70,353.28	\$58,072.43	\$192,541.22

It is observed that the total for additional New York City income tax asserted as due of \$167,973.66 represents 87% of the total tax asserted as due against petitioners.

The Statement of Audit Changes for 1987 included the following explanation:

"The taxpayers maintained a permanent place of abode in New York City. The taxpayers did not submit adequate records to establish that they spent less than 184 days in New York State & City. Accordingly, we hold the taxpayers as residents of New York State & City. We impose negligence [sic] penalties for failure to establish that there was reasonable cause for the understatement of taxes due."

The statements of audit changes for 1988 and 1989 also included the same explanation as noted above. In addition, the statement for 1988 noted:

"Per audit of Lazard Freres & Co., the New York State allocation has been changed. Partnership income has been increased by \$64,763.00. Dividend income has been decreased by 9,448.00."

Similarly, the statement for 1989 noted:

"Per audit of Lazard Freres & Co., the New York State allocation has been changed. Partnership income has been increased by \$31,010.00. Dividend income has been decreased by \$5,357.00."

The Division then issued a Notice of Deficiency dated July 6, 1992 against petitioners for 1987, 1988 and 1989 showing total income tax due for the three years of \$192,541.22, plus penalty and interest. The Notice of Deficiency showed a breakdown of this total which corresponded to the amounts for each of the years noted in Finding of Fact "1". The notice explained that the tax asserted as due was "[b]ased on an audit."

Petitioners' Tax Returns

For each of the years at issue, petitioners filed a New York State Nonresident Income Tax Return (Form IT-203) checking the filing status of "married filing joint return". For the years at issue, petitioners reported their income, with allocations to New York State, as follows:

	1987	1988	1989			
	Federal	NYS	Federal	NYS	Federal	NYS
	Amount	<u>Amount</u>	Amount	<u>Amount</u>	Amount	<u>Amount</u>
Wages & Salaries	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-	\$ -0-

Taxable interest income	124,734	78,567	120,203	31,785	130,545	35,235
Dividend income	78,432	43,944	185,099	147,493	195,314	147,226
Taxable refund of State and local taxes	105,383	105,383	24,728	-0-	45,023	21,989

Capital gain or (loss)	-3,000	-3,000	-3,000	37,600	52,116	4,760
Other gains or losses	-0-	-0-	-141	-0-	-0-	-0-
Rents and royalties ³	-19,170	-0-				
Partnerships and S corporations	1,682,216	1,713,832	1,997,611	1,972,937	1,571,484	1,676,855
Other income	-0-	-0-	-0-	-0-	<u>339</u>	<u>339</u>
Total	\$1,968,595	\$1,938,726	\$2,324,500	\$2,189,815	\$1,985,480	\$1,877,063

These tax returns were signed by both petitioners. It is further observed that the returns do not disclose the name of any paid preparer.⁴

Petitioners' tax returns were complex reports due to their involvement in 14 different partnerships and one subchapter S corporation, in addition to various transactions which produced capital gains and losses. Nonetheless, the source of most of petitioners' income was the partnership, Lazard Freres & Co., which passed on to petitioner John S. Tamagni the following items of income and loss:

<u>1987</u>	<u>1988</u>	<u>1989</u>				
<u>Loss</u>	<u>Income</u>	<u>Loss</u>	<u>Income</u>	<u>Loss</u>	Passive Income	Non-Passive Income
\$9,606.00	\$2,011,685.00	\$-0-	\$2,255,131.00	\$21,117.00	\$8,162.00	\$1,693,107.00

Mr. Tamagni also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years at issue reporting net earnings from his self-employment as a partner in Lazard Freres & Co. located at 1 Rockefeller Plaza in midtown Manhattan as follows:

<u>1987</u>	<u>1988</u>	<u>1989</u>
\$2,013,290.00	\$2,153,410.00	\$1,662,060.00

The City of New York nonresident earnings tax returns each included the following

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During 1988 and 1989, "Rents and royalties" were included in the item "Partnerships and S corporations" listed next in the table above.

⁴Mr. Tamagni testified that the returns were prepared by the tax department at Lazard Freres (tr., p. 247).

question:

"Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year? If Yes,⁵ give address below and number of days spent in the City of New York during [the particular year]."

For 1987, Mr. Tamagni answered "No" to this question.⁶ For 1988, he responded "Yes", noting an eastside Manhattan address of 29 East 64th Street and 131 days spent in New York City during 1988. For 1989, Mr. Tamagni also responded "Yes", noting the 29 East 64th Street address and 148 days spent in New York City during 1989.

As of the hearing date, Mr. Tamagni had been associated with Lazard Freres as an investment banker for 21 years. He described his position as follows:

"I'm a partner in the municipal finance operation of Lazard Freres and the functions of that department and my own activities within it are to assist state and local government financing infrastructure or other capital needs" (tr., p. 46).

His duties require considerable travel throughout the United States.

The Audit

The Division offered the testimony of its auditor, Richard Hayes, who first contacted the taxpayers by his letter dated May 9, 1991 mailed to petitioners "c/o Lazard, 1 Rockefeller Plaza, New York, NY 10020", which was

the address used by them on their tax returns described above. Mr. Hayes scheduled an appointment at 10:00 A.M. on June 6, 1991 at his office and requested that petitioners:

"Please have available for examination copies of Federal and State income tax returns, supporting schedules, all books, records, worksheets and other documents pertinent to the preparation of your income tax returns.

"Brokerage, savings and checking statements (including cancelled checks,

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The 1987 return did not include the words "If Yes".

⁶Mr. Tamagni testified that he erred in responding "No." He explained that he did not look at every line of his tax returns: "I basically look at the major items and the taxes that I owe" (tr., p. 248).

stubs and statements from January 1, 1987 through 12/31/89) [were also requested]."

In addition, Mr. Hayes enclosed a questionnaire that:

"asks taxpayers certain questions regarding which type of business he is employed in. Does he have a place in New York State. If so, when were the living quarters maintained. Is it an apartment, a co-op, a house[?] The number of days spent in New York State for work purposes. Number of dates spent on nonworking days, including holidays, weekends days [sic], sick day[s] . . ." (tr., p. 277).

Petitioners' former representative, Charles Stieglitz, responded to the auditor's initial letter and arranged a meeting for June 20, 1991. At the meeting, the auditor examined documents pertaining to the allocation to New York of interest, dividends, capital gains and partnership distributions. However, no records were then provided concerning days spent "in and out of New York State" (tr., p. 274). Mr. Hayes informed Mr. Stieglitz that he "needed to see records to support the number of days the taxpayers spent in New York State" (tr., pp. 276-277), and he gave the former representative a list of documents that he wanted to review:

"[d]iaries, expense reports, credit card statements and slips, bank statements, cancelled checks, phone bills, utility bills [and apparently another copy of the questionnaire described in Finding of Fact "9"]" (tr., p. 277).

The auditor did not receive many of the documents requested:

"At the subsequent meeting or meetings⁷ I received for examination taxpayer's diaries. Expense reports but only the cover sheet of the expense report. There was [sic] no supporting receipts . . .

* * *

"I received some American Express statements and slips for the period May 1988 through the end of 1989.⁸ I did not receive any bank statements. I did not receive

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The record discloses a subsequent meeting on February 20, 1992 attended by petitioners' current representatives and the auditor.

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Included in petitioners' Exhibit "10" are photocopies of the first pages of American Express statements, each one a "Summary of Corporate Card Account" which was in the name of "John S. Tamagni, Lazard Freres Co.", as follows:

Statement of Closing <u>Date</u>	Total <u>Charges</u>
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any cancelled checks. I did not receive any telephone bills for New York, New Jersey, New Hampshire places of abode of the taxpayer. I did not receive utility bills for the New York/New Jersey home, their places of abode, and I did not receive the audit questionnaire" (tr., pp. 279-280).

Mr. Hayes disagreed with the position of attorney Arthur Rosen, petitioners' current representative, expressed at a meeting on February 20, 1992 that diaries were sufficient to establish days in and out of New York. According to Mr. Hayes, Mr. Rosen explained that he would protest any assessment and, as noted by the auditor in his log (Division's Ex. "N", p. 8), "would have witnesses and statements [at the formal hearing] showing the taxpayers are not residents of N.Y." By a letter dated March 3, 1992,

Mr. Hayes wrote Mr. Rosen reiterating his position that "adequate records to substantiate that the taxpayers were not in New York State more than 183 days were not submitted for any of the years under examination."

The record does not disclose whether the Division was given a reason during the audit why petitioners did not or could not produce the various documents requested by Mr. Hayes. At the hearing, Mr. Tamagni explained that he and his wife did not keep their telephone bills: "After they were paid, they were discarded" (tr., p. 200). Nor did petitioners keep their utility bills for either their New Jersey home or New York City apartment once they had been paid. Mr. Tamagni testified that he was unaware that the auditor had requested all of petitioners' cancelled checks, but would have provided them if he "had been asked" (tr., p. 201). Like the telephone and utility bills, Mr. Tamagni indicated that he and his wife did not keep "our

7/15/88	\$2,941.21
8/16/88	1,314.24
9/15/88	1,031.24
10/14/88	976.60
11/14/88	1,438.49
1/14/89	920.87

It is unknown why petitioners did not introduce into the record similar statements for the entire period mentioned by the auditor.

personal credit card bills and invoices. After paying them we discarded them" (tr., p. 202).

Furthermore, Mr. Tamagni testified that he was not required "to attach receipts to substantiate expenses" (tr., p. 202) for purposes of his expense reports at Lazard Freres. As a result, petitioners' Exhibits "9", "10" and "11", which are photocopies of Mr. Tamagni's expense reports for his travel expenses incurred in his work on behalf of Lazard Freres & Co., do not include receipts. For example, a report dated March 5, 1987 included in Exhibit "9" shows total travel and entertainment expenses of \$2,160.35. Travel expenses were itemized but no receipts were attached:

<u>Date</u>	<u>Place Visited</u>	<u>Transportation</u>	<u>Hotel</u>	<u>Total Expense</u>
1/15/87	Phoenix, AZ	Avis - \$47.72	\$186.01	\$ 233.73
1/15/87	San Francisco, CA	Air - \$219.00	194.60	413.61
1/16/87	San Francisco, CA	Air - \$28.00		
	(Alon Kasha)	Air - \$28.00		56.00
1/19-20/87	Madison, WI	Air - \$496.00	78.40	574.40
1/21/87	Boston, MA	Air - \$119.00	197.64	<u>316.64</u>
				\$1,594.38

Similarly, entertainment expenses were itemized but no receipts were attached:

<u>Date</u>	<u>Place of Entertainment</u>	<u>Name of Person Entertained</u>	<u>Amount</u>
1/7/87	21 Club	R. Locke - E.F. Hutton	\$ 92.94
12/31/86	21 Club	B. Weintrob - Port Authority	106.22
1/12/87	The Sea Grill	W. Watt, M. DelGiudice	186.61
1/14/87	Charley O's	M. DelGiudice	16.65
2/2/87	American Festival	W. Watt	48.38
2/3/87	Ecco	Allan Haack - Port Authority	68.80
2/9/87	Charley O's	W. Watt	<u>46.37</u>
			\$565.97

It is observed that travel expenses of \$1,594.38, plus entertainment expenses of \$565.97, equals \$2,160.35, the amount Mr. Tamagni claimed on his expense report.

Stipulations

The parties executed an undated stipulation, marked into the record as petitioners' Exhibit "1", which provided that petitioners were not domiciled in New York during the years at issue. Rather, petitioners were domiciliaries of New Jersey, where they have resided at 55 Oxbow Lane, Summit, New Jersey for the past 14 years. The parties also executed a second

stipulation, marked into the record as petitioners' Exhibit "2", whereby they agreed that petitioners were not present in New York for 33 days in 1987, 31 days in 1988 and 42 days in 1988. The Division did not view the diaries as sufficient substantiation of petitioners' whereabouts which resulted in it stipulating to petitioners' presence outside of New York only for these limited number of days. Mr. Hayes testified as follows:

"[The diaries] were acceptable but they are not sufficient because it is Audit's position or policy to try and ascertain from third party records or other statements such as the American Express, airplane tickets, hotel bills to show that a taxpayer actually did spent time out of New York State" (tr., p. 293).

In particular, the auditor noted that, for many days, the diaries were blank and he could not verify a blank page.

Petitioners' Proof

Petitioners offered the testimony of Angela Musalo, an employee of Lazard Freres, who was John Tamagni's executive secretary for the past 20 years in the Municipal Finance Department at Lazard Freres. Petitioners introduced into evidence as their Exhibits "3", "4" and "5" hardcoverd and bound diaries for 1987, 1988 and 1989 which Ms. Musalo kept for Mr. Tamagni. She described how she maintained the diaries as follows:

"Well, if Mr. Tamagni had appointments for the day, I would record them. Any travel plans that he made, I would record in the diary with the time of his leaving New York or whatever city he was visiting" (tr., p. 23).

A close review of the diaries discloses that Ms. Musalo also recorded some personal appointments for Mr. Tamagni. For example, for Monday, June 15, 1987, there is a notation "30th Dartmouth College Reunion" and for Wednesday, August 12, 1987 there is an entry showing a theater date in the evening. However, Ms. Musalo testified that she did not "as a general rule, record [Mr. Tamagni's] personal appointments in [her] diary" and that "only when he was in New Hampshire" did she record Mr. Tamagni's weekend activities (tr., p. 26). On cross-examination, she noted that Lazard Freres had a policy requiring all partners to be available on weekends and that "one of the secretaries [would] type up a schedule of all the partners, where they will be for that particular weekend" (tr., p. 32). She added that one of the partners of the firm had the schedules. However, petitioners did not introduce them into

evidence.

Ms. Musalo also testified (in response to leading questions on direct examination) that, as a general practice, if Mr. Tamagni had a morning airline flight, he did not come into the office and, similarly, if his return flight arrived after 3:30 P.M., "he usually went home" (tr., p. 29; emphasis added).

John Tamagni's Testimony

The transcript of the hearing in this matter consists of 331 pages, of which Mr. Tamagni's testimony constituted over 200 pages. Using Ms. Musalo's diaries, as described in Finding of Fact "14", and his own diaries, which are hardbound engagement books, Mr. Tamagni testified as to days during the three years at issue when he was not present in New York State/City.⁹

Mr. Tamagni's testimony followed a certain pattern. On Saturdays and Sundays, unless the diaries specifically noted that he was in New York City, Mr. Tamagni testified: "It's my practice to spend my weekends with my wife at home" (tr., p. 77). This response was repeated frequently by the witness with regard to questioning concerning his whereabouts on the weekends. Mr. Tamagni travelled frequently on business trips and since the diaries noted his business trips, he used them to establish other days that he was not present in New York. In addition, he took several vacations which were

also noted in the diaries and these too were counted as days that he was not present in New York State/City.

Mr. Tamagni testified that, during the respective months of 1987, he was not in New York on the following days:¹⁰

⁹Occasionally, Mr. Tamagni pointed out days that he was in New York State, but not in New York City.

¹⁰As noted in Finding of Fact "13", the Division stipulated that petitioners were not present in New York for 33 days in 1987, 31 days in 1988 and 42 days in 1989. The particular days are

January 1987

Thurs., 1	-	Summit, N.J.
Fri., 2	-	Summit, N.J.
Sat., 3	-	Summit, N.J.
Sun., 4	-	Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Thurs., 15	-	Outside N.Y. per stipulation
Fri., 16	-	San Francisco
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Mon., 19	-	Madison, Wisconsin
Tues., 20	-	Outside N.Y. per stipulation
Wed., 21	-	Outside N.Y. per stipulation
Sat., 24	-	New Jersey
Sun., 25	-	New Jersey
Thurs., 29	-	Cleveland
Sat., 31	-	New Jersey

Total: 17 days outside New York State/City

February 1987

Sun., 1	-	Summit, N.J.
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Wed., 11	-	New Hampshire ¹¹
Thurs., 12	-	New Hampshire
Fri., 13	-	New Hampshire
Sat., 14	-	New Hampshire
Sun., 15	-	New Hampshire
Mon., 16	-	New Hampshire
Tues., 17	-	Summit, N.J.
Wed., 18	-	Seattle
Thurs., 19	-	Seattle to Summit, N.J.
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Thurs., 26	-	Boston
Sat., 28	-	Summit, N.J.

included in the count of days petitioners were outside New York in the analysis of Mr. Tamagni's testimony in this Finding of Fact, and such days are referenced by the notation "per stipulation".

¹¹Since 1984, petitioners have owned a vacation home in Grantham, New Hampshire which they use in the summer, fall and winter and rarely in the "kind of muddy" spring (tr., p. 69).

Total: 16 days outside New York State/City

March 1987

Sun., 1	-	Summit, N.J.
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Sat., 14	-	Summit, N.J.
Sun., 15	-	Summit, N.J.
Mon., 16	-	Columbia, South Carolina
Tues., 17	-	Outside New York per stipulation
Wed., 18	-	Outside New York per stipulation
Thurs., 19	-	Outside New York per stipulation
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Tues., 24	-	Orlando, Florida
Wed., 25	-	Springfield, Missouri
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 15 days outside New York State/City

April 1987

Fri., 3	-	Outside New York per stipulation
Sat., 4	-	Outside New York per stipulation
Sun., 5	-	Outside New York per stipulation
Mon., 6	-	San Francisco to Summit, N.J.
Fri., 10	-	Grand Rapids, Michigan to Richmond, Virginia
Sat., 11	-	Richmond
Sun., 12	-	Richmond to Summit, N.J.
Mon., 13	-	Santa Fe, New Mexico
Tues., 14	-	Santa Fe
Fri., 17 (Good Friday)	-	Summit, N.J.
Sat., 18	-	Summit, N.J.
Sun., 19 (Easter)	-	Summit, N.J.
Tues., 21	-	Cleveland
Wed., 22	-	Sacramento
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.
Tues., 28	-	Washington, D.C.

Total: 17 days outside New York State/City

May 1987

Sat., 2	-	Summit, N.J.
Sun., 3	-	Summit, N.J.
Sat., 9	-	Summit, N.J.

Sun., 10	-	Summit, N.J.
Fri., 15	-	Paris, France
Sat., 16	-	Outside New York per stipulation
Sun., 17	-	Outside New York per stipulation
Mon., 18	-	Outside New York per stipulation
Tues., 19	-	Outside New York per stipulation
Wed., 20	-	Outside New York per stipulation
Thurs., 21	-	Outside New York per stipulation
Fri., 22	-	Outside New York per stipulation
Sat., 23	-	Outside New York per stipulation
Sun., 24	-	Outside New York per stipulation
Mon., 25	-	Outside New York per stipulation
Tues., 26	-	Outside New York per stipulation
Wed., 27	-	Outside New York per stipulation
Thurs., 28	-	Outside New York per stipulation
Fri., 29	-	Outside New York per stipulation
Sat., 30	-	Summit, N.J.
Sun., 31	-	Summit, N.J.

Total: 21 days outside New York State/City

June 1987

Mon., 1	-	Albany, New York
Sat., 6	-	Summit, N.J.
Sun., 7	-	Summit, N.J.
Wed., 10	-	Boston
Fri., 12	-	New Hampshire
Sat., 13	-	New Hampshire
Sun., 14	-	New Hampshire
Mon., 15	-	New Hampshire
Tues., 16	-	New Hampshire
Wed., 17	-	New Hampshire
Fri., 19	-	New Hampshire
Sat., 20	-	New Hampshire
Sun., 21	-	New Hampshire to Summit, N.J.
Sat., 27	-	Summit, N.J.
Sun., 28	-	Summit, N.J.

Total: 15 days outside New York City
14 days outside New York State

July 1987

Wed., 1	-	Helena, Montana
Fri., 3	-	New Hampshire
Sat., 4	-	New Hampshire
Sun., 5	-	New Hampshire
Mon., 6	-	New Hampshire
Wed., 8	-	Outside New York per stipulation

Sat., 11	-	Summit, N.J.
Sun., 12	-	Summit, N.J.
Sat., 18	-	Summit, N.J.
Sun., 19	-	Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.
Thurs., 30	-	San Francisco
Fri., 31	-	New Hampshire

Total: 14 days outside New York State/City

August 1987

Sat., 1	-	New Hampshire
Sun., 2	-	New Hampshire
Mon., 3	-	New Hampshire
Tues., 4	-	New Hampshire
Sat., 8	-	Summit, N.J.
Sun., 9	-	Summit, N.J.
Sat., 15	-	Summit, N.J.
Sun., 16	-	Summit, N.J.
Tues., 18	-	Boston ¹²
Thurs., 20	-	Outside New York per stipulation
Sat., 22	-	Summit, N.J.
Sun., 23	-	Summit, N.J.
Mon., 24	-	Summit, N.J. and South Carolina

¹²Mr. Tamagni testified that he was in Boston on August 17, 1987 (tr., p. 101). However, the diaries indicate he was in Boston on August 18, 1987.

Sat., 29	-	Summit, N.J.
Sun., 30	-	Summit, N.J.

Total: 15 days outside New York State/City

September 1987

Thurs., 3	-	New Hampshire
Fri., 4	-	Outside New York per stipulation
Sat., 5	-	Outside New York per stipulation
Sun., 6	-	Outside New York per stipulation
Mon., 7	-	Outside New York per stipulation
Tues., 8	-	New Hampshire and Summit, N.J.
Sat., 12	-	Summit, N.J.
Sun., 13	-	Summit, N.J.
Thurs., 17	-	Baton Rouge, Louisiana and Summit, N.J.
Sat., 19	-	Summit, N.J.
Sun., 20	-	Summit, N.J.
Wed., 23	-	Boston
Sat., 26	-	Summit, N.J.
Sun., 27	-	Summit, N.J.
Wed., 30	-	Philadelphia and Boston

Total: 15 days outside New York State/City

October 1987

Sat., 3	-	Summit, N.J. or Boston
Sun., 4	-	Summit, N.J. or Boston
Thurs., 8	-	Washington, D.C. and Cincinnati
Fri., 9	-	Cincinnati and Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Tues., 13	-	Boston and Summit, N.J.
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Fri., 23	-	Boston
Sat., 24	-	Theater in New York City ¹³
Sun., 25	-	Summit, N.J.
Wed., 28	-	Los Angeles
Thurs., 29	-	Outside New York per stipulation
Sat., 31	-	Summit, N.J.

¹³Weekend days on which Mr. Tamagni specified he was in New York City are included in these schedules because such testimony is critical to the resolution of this matter as noted in the Conclusions of Law.

Total: 14 days outside New York State/City

November 1987

Sun., 1	-	Summit, N.J.
Wed., 4	-	San Francisco
Thurs., 5	-	Outside New York per stipulation
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Mon., 9	-	South Carolina
Tues., 10	-	Lakewood, N.J.
Fri., 13	-	Outside New York per stipulation
Sat., 14	-	Richmond, Virginia
Sun., 15	-	Richmond, Virginia
Thurs., 19	-	Phoenix, Arizona and Summit, N.J.
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Thurs., 26	-	Summit, N.J.
Fri., 27	-	Summit, N.J.
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 17 days outside New York State/City

December 1987

Tues., 1	-	San Francisco
Fri., 4	-	Summit, N.J. to Mineola, Nassau County
Sat., 5	-	Summit, N.J.
Sun., 6	-	Summit, N.J.
Thurs., 10	-	Outside New York per stipulation
Fri., 11	-	Summit, N.J. to North Hempstead, Nassau County
Sat., 12	-	Summit, N.J.
Sun., 13	-	Summit, N.J.
Fri., 18	-	Summit, N.J. to Mineola, Nassau County
Sat., 19	-	Summit, N.J.
Sun., 20	-	Summit, N.J.
Fri., 25	-	Summit, N.J.
Sat., 26	-	Summit, N.J.
Sun., 27	-	Summit, N.J.
Mon., 28	-	Summit, N.J.
Wed., 30	-	Summit, N.J. to San Francisco
Thurs., 31	-	San Francisco

Total: 17 days outside New York City
14 days outside New York State

These 1987 monthly totals add up to 193 days outside New York City and 189 days outside New York State for the year, or 172 days present in New York City and 176 days

present in New York State.

January 1988

Fri., 1	-	San Francisco
Sat., 2	-	San Francisco and Summit, N.J.
Sun., 3	-	Summit, N.J.
Fri., 8	-	Mineola, Nassau County
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Fri., 15	-	New Hampshire
Sat., 16	-	Outside New York per stipulation
Sun., 17	-	Outside New York per stipulation
Mon., 18	-	New Hampshire to Summit, N.J.
Thurs., 21	-	Phoenix, Arizona
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.
Wed., 27	-	Phoenix, Arizona
Sat., 30	-	Summit, N.J.
Sun., 31	-	Summit, N.J.

Total: 16 days outside New York City
15 days outside New York State

February 1988

Mon., 1	-	Phoenix, Arizona to Summit, N.J.
Sat., 6	-	Summit, N.J.
Sun., 7	-	Summit, N.J.
Sat., 13	-	Summit, N.J.
Sun., 14	-	Summit, N.J.
Mon., 15	-	Summit, N.J.
Sat., 20	-	Summit, N.J.
Sun., 21	-	Summit, N.J.
Wed., 24	-	Washington, D.C.
Sat., 27	-	Summit, N.J.
Sun., 28	-	Summit, N.J.

Total: 11 days outside New York State/City

March 1988

Sat., 5	-	Summit, N.J.
Sun., 6	-	Summit, N.J.
Thurs., 10	-	Newark, N.J.
Sat., 12	-	Summit, N.J.
Sun., 13	-	Summit, N.J.
Tues., 15	-	Harrisburg, Pennsylvania
Fri., 18	-	Washington, D.C. to Mineola, Nassau County
Sat., 19	-	Summit, N.J.

Sun., 20	-	Summit, N.J.
Sat., 26	-	Summit, N.J.
Sun., 27	-	Summit, N.J. but <u>dinner</u> in N.Y.C.
Thurs., 31	-	San Francisco

Total: 11 days outside New York City
10 days outside New York State

April 1988

Fri., 1	-	Summit, N.J.
Sat., 2	-	Summit, N.J.
Sun., 3	-	Summit, N.J.
Thurs., 7	-	Nashua, New Hampshire
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Wed., 13	-	Summit, N.J. to Phoenix, Arizona
Thurs., 14	-	Outside New York per stipulation
Fri., 15	-	Phoenix to Summit, N.J.
Sat., 16	-	Summit, N.J.
Sun., 17	-	Summit, N.J.
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J. to Charleston, South Carolina
Mon., 25	-	Charleston to Summit, N.J.
Fri., 29	-	New Hampshire
Sat., 30	-	New Hampshire

Total: 16 days outside New York State/City

May 1988

Sun., 1	-	New Hampshire
Mon., 2	-	New Hampshire
Wed., 4	-	Seattle
Sat., 7	-	Greenwich, Connecticut and Summit, N.J.
Sun., 8	-	Greenwich, Connecticut and Summit, N.J.
Mon., 9	-	Newark, N.J.
Sat., 14	-	Summit, N.J.
Sun., 15	-	Summit, N.J.
Wed., 18	-	Summit, N.J. to Los Angeles
Thurs., 19	-	Outside New York per stipulation
Fri., 20	-	Outside New York per stipulation
Sat., 21	-	Outside New York per stipulation
Sun., 22	-	Outside New York per stipulation
Mon., 23	-	Bermuda
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.
Mon., 30	-	Summit, N.J.

Total: 17 days outside New York State/City

June 1988

Fri., 3	-	Nashua, New Hampshire
Sat., 4	-	Summit, N.J.
Sun., 5	-	Summit, N.J.
Mon., 6	-	Phoenix, Arizona
Fri., 10	-	New Hampshire
Sat., 11	-	Outside New York per stipulation
Sun., 12	-	New Hampshire
Mon., 13	-	New Hampshire
Sat., 18	-	New York City - departmental meeting
Sun., 19	-	Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J. to Seattle
Mon., 27	-	Seattle
Tues., 28	-	Seattle to Summit, N.J.

Total: 13 days outside New York State/City

July 1988

Fri., 1	-	New Hampshire
Sat., 2	-	Outside New York per stipulation
Sun., 3	-	Outside New York per stipulation
Mon., 4	-	Outside New York per stipulation
Tues., 5	-	New Hampshire to Summit, N.J.
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Wed., 13	-	Outside New York per stipulation
Thurs., 14	-	Cleveland, Ohio to Summit, N.J.
Fri., 15	-	Summit, N.J. to New Hampshire
Sat., 16	-	Outside New York per stipulation
Sun., 17	-	Outside New York per stipulation
Mon., 18	-	New Hampshire
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.
Sat., 30	-	New Hampshire
Sun., 31	-	New Hampshire

Total: 17 days outside New York State/City

August 1988

Mon., 1	-	New Hampshire
Tues., 2	-	New Hampshire
Wed., 3	-	New Hampshire to Summit, N.J.
Fri., 5	-	Outside New York per stipulation

Sat., 6	-	Outside New York per stipulation
Sun., 7	-	Outside New York per stipulation
Mon., 8	-	Outside New York per stipulation
Tues., 9	-	Outside New York per stipulation
Wed., 10	-	San Francisco to Summit, N.J.
Sat., 13	-	Summit, N.J.
Sun., 14	-	Summit, N.J.
Sat., 20	-	Summit, N.J.
Sun., 21	-	Summit, N.J.
Sat., 27	-	Summit, N.J.
Sun., 28	-	Summit, N.J.
Mon., 29	-	[Washington, D.C. ¹⁴]
Tues., 30	-	Summit, N.J. to Omaha, Nebraska
Wed., 31	-	[Omaha, Nebraska to Newark, N.J. ¹⁵]

Total: 16 days outside New York State/City (not counting the 29th
and 31st)

September 1988

Thurs., 1	-	Summit, N.J. to New Hampshire
Fri., 2	-	Outside New York per stipulation
Sat., 3	-	Outside New York per stipulation
Sun., 4	-	Outside New York per stipulation
Mon., 5	-	New Hampshire
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Wed., 14	-	Outside New York per stipulation
Thurs., 15	-	Seattle to Summit, N.J.
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Thurs., 22	-	Hartford, Connecticut
Fri., 23	-	Summit, N.J. to Nevada
Sat., 24	-	Nevada to Summit, N.J.
Sun., 25	-	Summit, N.J.
Thurs., 29	-	Washington, D.C.

Total: 16 days outside New York State/City

¹⁴According to Mr. Tamagni, the diaries indicated that he was in Washington, D.C., but he had "no recollection of the trip" (tr., p. 144).

¹⁵Mr. Tamagni noted that he arrived in Newark at 11:30 A.M. and did not recall whether he went to his New York City office on that day (tr., p. 145).

October 1988

Sat., 1	-	Summit, N.J.
Sun., 2	-	Summit, N.J.
Mon., 3	-	Birmingham, Alabama
Tues., 4	-	Outside New York per stipulation
Sat., 8	-	Summit, N.J.
Sun., 9	-	Summit, N.J.
Wed., 12	-	Outside New York per stipulation
Thurs., 13	-	Phoenix to Summit, N.J.
Fri., 14	-	New Hampshire
Sat., 15	-	New Hampshire
Sun., 16	-	New Hampshire
Mon., 17	-	New Hampshire to Summit, N.J.
Sat., 22	-	Outside New York per stipulation
Sun., 23	-	Outside New York per stipulation
Thurs., 27	-	Phoenix to Summit, N.J.
Sat., 29	-	Summit, N.J.
Sun., 30	-	Summit, N.J.

Total: 17 days outside New York State/City

November 1988

Sat., 5	-	Outside New York per stipulation
Sun., 6	-	Outside New York per stipulation
Wed., 9	-	San Francisco/Seattle
Sat., 12	-	Summit, N.J.
Sun., 13	-	Summit, N.J.
Thurs., 17	-	Los Angeles
Sat., 19	-	Summit, N.J.
Sun., 20	-	Summit, N.J.
Thurs., 24	-	Summit, N.J.
Fri., 25	-	Summit, N.J.
Sat., 26	-	Summit, N.J.
Sun., 27	-	Summit, N.J.
Wed., 30	-	Outside New York per stipulation

Total: 13 days outside New York State/City

December 1988

Thurs., 1	-	Outside New York per stipulation
Sat., 3	-	Summit, N.J.
Sun., 4	-	Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Fri., 23	-	Summit, N.J.

Sat., 24	-	Summit, N.J.
Sun., 25	-	Summit, N.J.
Mon., 26	-	Summit, N.J.
Thurs., 29	-	Washington, D.C.
Fri., 30	-	Summit, N.J.
Sat., 31	-	Summit, N.J.

Total: 14 days outside New York State/City

These 1988 monthly totals add up to 177 days outside New York City and 175 days outside New York State, or 189 days in New York City and 191 days in New York State for 1988. (It is observed that 1988 was a leap year with a total of 366 days.)

January 1989

Sun., 1	-	Summit, N.J.
Mon., 2	-	Summit, N.J.
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Fri., 13	-	New Hampshire
Sat., 14	-	New Hampshire
Sun., 15	-	New Hampshire
Mon., 16	-	New Hampshire
Wed., 18	-	Sacramento, California
Thurs., 19	-	Outside New York per stipulation
Fri., 20	-	Utah to New Jersey
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Wed., 25	-	Washington, D.C.
Thurs., 26	-	Outside New York per stipulation
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 17 days outside New York State/City

February 1989

Fri., 3	-	New Hampshire
Sat., 4	-	New Hampshire
Sun., 5	-	New Hampshire
Mon., 6	-	New Hampshire to Summit, N.J.
Sat., 11	-	Summit, N.J.
Sun., 12	-	Summit, N.J.
Sat., 18	-	Boston
Sun., 19	-	Boston
Mon., 20	-	Boston to Summit, N.J.
Tues., 21	-	Sacramento
Wed., 22	-	Sacramento to Summit, N.J.
Sat., 25	-	Summit, N.J.

Sun., 26	-	Summit, N.J.
Tues., 28	-	Outside New York per stipulation

Total: 14 days outside New York State/City

March 1989

Wed., 1	-	Outside New York per stipulation
Tues., 2	-	Phoenix to Summit, N.J.
Sat., 4	-	Summit, N.J.
Sun., 5	-	Summit, N.J.
Thurs., 9	-	Boston/Washington, D.C.
Sat., 11	-	Summit, N.J. but also theater in New York City
Sun., 12	-	Summit, N.J.
Mon., 13	-	Outside New York per stipulation
Tues., 14	-	Washington, D.C. to Summit, N.J.
Fri., 17	-	Columbia, South Carolina
Sat., 18	-	Summit, N.J.
Sun., 19	-	Summit, N.J.
Wed., 22	-	Phoenix, Arizona
Thurs., 23	-	Phoenix to Summit, N.J.
Fri., 24	-	Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.

Total: 16 days outside New York State/City

April 1989

Sat., 1	-	Summit, N.J.
Sun., 2	-	Summit, N.J. to Portland, Maine
Mon., 3	-	Augusta, Georgia to Summit, N.J.
Sat., 8	-	Summit, N.J.
Sun., 9	-	Summit, N.J.
Thurs., 13	-	Phoenix, Arizona to Summit, N.J.
Sat., 15	-	Summit, N.J.
Sun., 16	-	Summit, N.J.
Wed., 19	-	Outside New York per stipulation
Thurs., 20	-	Outside New York per stipulation
Fri., 21	-	Outside New York per stipulation
Sat., 22	-	Outside New York per stipulation
Sun., 23	-	San Francisco to Summit, N.J.
Fri., 28	-	Boston/Richmond, Virginia
Sat., 29	-	Richmond
Sun., 30	-	Richmond

Total: 16 days outside New York State/City

May 1989

Sat., 6	-	Outside New York per stipulation
Sun., 7	-	Outside New York per stipulation
Sat., 13	-	Summit, N.J.
Sun., 14	-	Outside New York per stipulation
Fri., 19	-	Los Angeles to Summit, N.J.
Sat., 20	-	Summit, N.J.
Sun., 21	-	Summit, N.J.
Fri., 26	-	Outside New York per stipulation
Sat., 27	-	Outside New York per stipulation
Sun., 28	-	Outside New York per stipulation
Mon., 29	-	Outside New York per stipulation
Tues., 30	-	Outside New York per stipulation

Total: 12 days outside New York State/City

June 1989

Sat., 3	-	Summit, N.J.
Sun., 4	-	Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Sat., 24	-	Summit, N.J.
Sun., 25	-	Summit, N.J.
Tues., 27	-	Albany to Summit, N.J.
Fri., 30	-	New Hampshire

Total: 10 days outside New York City
9 days outside New York State

July 1989

Sat., 1	-	Outside New York per stipulation
Sun., 2	-	Outside New York per stipulation
Mon., 3	-	Outside New York per stipulation
Tues., 4	-	Outside New York per stipulation
Wed., 5	-	Outside New York per stipulation
Thurs., 6	-	Outside New York per stipulation
Fri., 7	-	Outside New York per stipulation
Sat., 8	-	New Hampshire
Sun., 9	-	New Hampshire to Summit, N.J.
Thurs., 13	-	Outside New York per stipulation
Fri., 14	-	San Francisco
Sat., 15	-	Summit, N.J.
Sun., 16	-	Summit, N.J.
Tues., 18	-	Outside New York per stipulation
Fri., 21	-	Lansing, Michigan

Sat., 22	-	Summit, N.J.
Sun., 23	-	Summit, N.J.
Tues., 25	-	Danvers, Massachusetts
Sat., 29	-	Summit, N.J.
Sun., 30	-	Summit, N.J.

Total: 20 days outside New York State/City

August 1989

Sat., 5	-	Summit, N.J.
Sun., 6	-	Summit, N.J.
Mon., 7	-	Syracuse, New York
Thurs., 10	-	Detroit, Michigan to Summit, N.J. to New Hampshire
Fri., 11	-	Outside New York per stipulation
Sat., 12	-	Outside New York per stipulation
Sun., 13	-	Outside New York per stipulation
Mon., 14	-	Outside New York per stipulation
Tues., 15	-	Outside New York per stipulation
Wed., 16	-	Outside New York per stipulation
Thurs., 17	-	Seattle to Summit, N.J.
Sat., 19	-	Summit, N.J.
Sun., 20	-	Summit, N.J.
Thurs., 24	-	Syracuse, New York
Fri., 25	-	Boston
Sat., 26	-	Summit, N.J.
Sun., 27	-	Summit, N.J.
Thurs., 31	-	New Hampshire

Total: 18 days outside New York City

16 days outside New York State

September 1989

Fri., 1	-	Outside New York per stipulation
Sat., 2	-	Outside New York per stipulation
Sun., 3	-	Outside New York per stipulation
Mon., 4	-	Outside New York per stipulation
Tues., 5	-	New Hampshire to Summit, N.J.
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Thurs., 14	-	Boston
Sat., 16	-	Summit, N.J.
Sun., 17	-	Summit, N.J.
Wed., 20	-	Syracuse, New York
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.

Wed., 27	-	Boston
Sat., 30	-	Outside New York per stipulation

Total: 15 days outside New York City
14 days outside New York State

October 1989

Sun., 1	-	Outside New York per stipulation
Mon., 2	-	New Hampshire to Summit, N.J.
Thurs., 5	-	Bloomington, Minnesota from Summit, N.J.
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Wed., 11	-	Washington, D.C. from Summit, N.J.
Sat., 14	-	Summit, N.J.
Sun., 15	-	Summit, N.J.
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Thurs., 26	-	Phoenix, Arizona
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 13 days outside New York State/City

November 1989

Thurs., 2	-	Phoenix, Arizona from Summit, N.J.
Fri., 3	-	Outside New York per stipulation
Sat., 4	-	Phoenix, Arizona to Summit, N.J.
Sun., 5	-	Summit, N.J.
Sat., 11	-	Summit, N.J.
Sun., 12	-	Summit, N.J.
Mon., 13	-	Phoenix, Arizona from Summit, N.J.
Tues., 14	-	Phoenix, Arizona to Summit, N.J.
Fri., 17	-	Boston
Sat., 18	-	Summit, N.J.
Sun., 19	-	Summit, N.J.
Wed., 22	-	Phoenix, Arizona from Newark, N.J.
Thurs., 23	-	Phoenix to Summit, N.J.
Fri., 24	-	Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.
Mon., 27	-	Phoenix, Arizona from Summit, N.J.
Tues., 28	-	Outside New York per stipulation
Wed., 29	-	Outside New York per stipulation
Thurs., 30	-	Outside New York per stipulation

Total: 20 days outside New York State/City

December 1989

Fri., 1	-	Boca Raton, Florida
Sat., 2	-	Summit, N.J.
Sun., 3	-	Summit, N.J.
Wed., 6	-	Phoenix, Arizona from Summit, N.J.
Thurs., 7	-	Phoenix to Summit, N.J. to Washington, D.C.
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Fri., 15	-	Chicago, Illinois to Summit, N.J.
Sat., 16	-	Summit, N.J.
Sun., 17	-	Summit, N.J.
Fri., 22	-	Harrisburg, Pennsylvania
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.
Mon., 25	-	Summit, N.J.
Tues., 26	-	Summit, N.J.
Sat., 30	-	Summit, N.J.
Sun., 31	-	Summit, N.J.

Total: 17 days outside New York State/City

These 1989 monthly totals add up to 188 days outside New York City and 184 days outside New York State, or 177 days in New York City and 181 days in New York State.

During the auditor's testimony at the hearing, certain discrepancies between the diaries (Petitioners' Ex. "3" through "8") and the expense reports (Petitioners' Ex. "9" through "11") were alleged. The first related to November 4, 1987. The diaries indicated that Mr. Tamagni was in San Francisco on November 4th and 5th, but the expense reports indicated a charge in San Francisco for November 2nd and that Mr. Tamagni was in San Francisco from November 2nd through 4th (tr., pp. 285-286). The charge on November 2nd related to the use of an airphone. However, there were no other charges for the dates on the expense report (tr., pp. 304-305).

The next inconsistency raised by the auditor concerned August 25, 1988 because Mr. Tamagni's diary noted a meeting in New York City, while Ms. Musalo's diary stated "Cleveland" (tr., pp. 287-288). However, Ms. Musalo's diary also indicated that "Cleveland" was "cancelled" so that the auditor's focus on this date is inexplicable. Similarly, although it was not clear from his direct examination what the alleged inconsistency was, on cross-examination, the auditor explained that there were no entries in Mr. Tamagni's diary for

August 26th through the 28th, yet there were charges for the 28th and 30th (tr., pp. 305-307). The auditor did not explain why a charge on August 30th was relevant to what the diary indicated for August 26, 27, and 28. In addition, Mr. Tamagni did not claim that he was out of New York on August 26, 1988.

On Thursday, October 13, 1988, according to Ms. Musalo's diary, Mr. Tamagni was returning from Phoenix, Arizona. In addition, the Division produced an American Express charge for the Holiday Inn in White River Junction, Vermont, signed by Mrs. Tamagni for such date. The auditor raised these facts to demonstrate that petitioners did not always travel together. However, this was consistent with petitioners' testimony that Mrs. Tamagni rarely travelled with her husband on business (tr., pp. 64, 220 and 307). Moreover, the diaries indicated New Hampshire for that weekend. Petitioners provided the following reason for the Vermont hotel charge for a date on which Mr. Tamagni was in Phoenix: Mrs. Tamagni picked her husband up at the airport and they stopped at a hotel for the night on their way up to New Hampshire for the weekend (tr., pp. 308-310).

Finally, when questioned about inconsistencies, the auditor raised January 18, 1989. Ms. Musalo's diary indicated that Mr. Tamagni left LaGuardia Airport at 6:30 A.M. for Chicago. The auditor questioned whether Mr. Tamagni slept at his New York City apartment the previous night in light of the early departure (tr., p. 291). Mr. Tamagni noted that from his Manhattan apartment to John F. Kennedy Airport took 40 minutes to travel, while from his New Jersey home to Kennedy Airport took 70 minutes, only 30 minutes longer (tr., p. 204).

These alleged discrepancies were the only ones raised by the Division at the hearing. In short, out of 1,096 days at issue during 1987, 1988 and 1989, discrepancies were claimed with respect to only a handful of days. In fact, on cross-examination, the auditor acknowledged that there were not many discrepancies between the diaries and the expense reports -- only one or two during the three years at issue (tr., pp. 312-313).

Petitioners contend that in addition to the days listed above as days outside New York, Mr. Tamagni did not go into work in New York City due to illness on one or two days per year:

Attorney Rosen: "Mr. Tamagni, are there times during 1987, '88 and '89 when you did not go to your office in New York because you were not feeling well?"

John Tamagni: "I had an occasional sick day, yes."

Attorney Rosen: "What is your guess about how many days a year that would be?"

John Tamagni: "I'm healthy. One or two days a year."

Attorney Rosen: "One or two days a year. Do you have to keep track of your sick days? Do you have an allocated number of sick days?"

John Tamagni: "No." (Tr., pp. 117-118.)

Mr. Tamagni was then queried by his attorney concerning days during the years at issue which appear blank in the diaries on which he "might have been" sick (tr., p. 118).

Petitioners also contend that Mr. Tamagni occasionally took an extended weekend by taking off a Monday or Friday:

Attorney Rosen: "The days I asked for 1987, '88, '89 [when Mr. Tamagni might have been sick] are Fridays and Mondays that appear blank in your diary. Did you ever take three-day weekends during those years as far as being at home in New Jersey?"

John Tamagni: "On rare occasions."

Attorney Rosen: "Once or twice?"

John Tamagni: "Once or twice." (Tr., p. 199.)

There were some days which Mr. Tamagni might have claimed to have been outside New York based upon entries or the lack of entries in the diaries, but, instead, he treated such days as New York days:

<u>Day</u>	<u>Transcript Page</u>	<u>Mr. Tamagni's Position</u>
August 13, 1987	pp. 99-100	Conceivably could have been in N.Y.C. apartment morning of flight from LaGuardia to Albany.
September 28, 1987	p. 106	Business meeting at night in N.Y.C. after return from Columbia, South Carolina.
October 1, 1987	p. 107	In Mineola, Nassau County, but could have spent part

		of day in N.Y.C.
February 10, 1988	p. 125	In North Hempstead, Nassau County, but conceivably was also in N.Y.C. that day.
March 17, 1988	p. 128	In Washington, D.C., but might have spent night before in N.Y.C. and left for airplane from N.Y.C. apartment.
April 20, 1988	p. 132	In Rocky Hill, Connecticut, but does not recall whether he left from New York or New Jersey.
August 29, 1988	pp. 144-145	Diaries indicate Washington, D.C., but had no recollection of the trip.

October 31, 1988	p. 152	In Hartford, Connecticut, but probably left from N.Y.C.
November 10, 1988	p. 153	On return from Seattle at 8:40 P.M. went to N.Y.C. apartment.
October 31, 1989	No reference in transcript	Diary says in Syracuse, but petitioner did not claim outside N.Y.C.

The testimony of petitioner Janet Tamagni concerning the number of weekends that petitioners were in New York City varied considerably¹⁶ from her husband's:

Attorney Rosen: "During the years 1987 through 1989, did you ever come to New York City during the week?"

Janet Tamagni: "Yes."

Attorney Rosen: "Do you ever come during the weekends?"

Janet Tamagni: "Very rarely."

Attorney Rosen: "How often would you estimate you would come each year to New York City on the weekends?"

Janet Tamagni: "Maybe five."

Attorney Rosen: "Did you ever come to New York City by yourself on weekends?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as ten times a year?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as seven?"

Janet Tamagni: "Me alone or together?"

Attorney Rosen: "Together."

Janet Tamagni: "Anything is possible but --"

¹⁶Mrs. Tamagni did not enter the hearing room until 12:09 P.M. on the first day of the hearing on September 28, 1994, and she was not present in the hearing room during a large part of the afternoon session on September 28, 1994. It was not until 4:25 P.M. on September 28, 1994 that she testified. In sum, Mrs. Tamagni did not hear most of her husband's testimony.

Attorney Rosen: "What is your belief?"

Janet Tamagni: "I don't know."

Attorney Rosen: "Could it have been as few as three?"

Janet Tamagni: "No. Probably more like five."

Attorney Rosen: "When you would come to the City on those five times, approximately, a year on the weekends, what would you do?"

Janet Tamagni: "We would go to dinner with some friends. Spend the night. Sometimes come home on Saturday night because Jack likes to, like he said, be home on Sunday to do chores and stuff."

Attorney Rosen: "Do you remember spending a Saturday night in the City?"

Janet Tamagni: "As I say three, four, five times maybe."

Attorney Rosen: "I'm asking the first question I asked and I should re-ask. I'm not talking about nights. The first question I asked was how many times during each of those years would you and Mr. Tamagni come into the City. Not spend the night, come into the City. That was the first question I asked."

Janet Tamagni: "Oh."

Attorney Rosen: "Was that approximately five, more than five, less than five?"

Janet Tamagni: "Maybe a little more than five. I don't know."

Attorney Rosen: "Could be as many as seven?"

Janet Tamagni: "It's possible."

Attorney Rosen: "Could it be ten?"

Janet Tamagni: "I don't know."

Attorney Rosen: "You don't know?"

Janet Tamagni: "I don't remember that far back. I don't know."

Attorney Rosen: "To --"

Janet Tamagni: "I hate to say no because I don't want to lie on the stand but I don't think so."

Attorney Rosen: "Could it -- You think it would be more than three?"

Janet Tamagni: "Yes. Bigger than a bread box."

Attorney Rosen: "How many Saturday nights each year, approximately, did you spend in the apartment in New York City?"

Janet Tamagni: "As I said, probably three, four, five."

Attorney Rosen: "Half of the time you would come to the City on the weekends, you'd spend the night on a Saturday?"

Janet Tamagni: "I don't see what difference it makes but I don't remember."

Attorney Rosen: "Do you keep a diary or calendar?"

Janet Tamagni: "No diary; calendar, yeah."

Attorney Rosen: "Do you have that calendar for 1986 to 19--"

Janet Tamagni: "I have no calendar but 1993."

Attorney Rosen: "What did you do with the calendars for '87, '88, '89?"

Janet Tamagni: "I threw them away."

Attorney Rosen: "When did you throw them away?"

Janet Tamagni: "Every year."

Attorney Rosen: "When would you have thrown away the 1987 calendar?"

Janet Tamagni: "1988."

Attorney Rosen: "Subsequent year to the year?"

Janet Tamagni: "You got it."

Attorney Rosen: "Same for '88 through '89?"

Janet Tamagni: "Um-hmm."

Attorney Rosen: "In '89 you threw away '88?"

Janet Tamagni: "Yes." (Tr., pp. 254-257.)

On direct examination, Mr. Tamagni testified that he purchased the Manhattan apartment at 29 East 64th Street "[p]rincipally to provide a place that I could spend the night if I had been working late or to reduce the rigors of commutation from Summit, New Jersey" (tr., pp. 46-47). Later in the hearing, it was disclosed during questioning by the Administrative Law Judge that in 1980 or 1981, Mr. Tamagni had purchased a Manhattan apartment at 25 West 54th Street and that the one at 29 East 64th Street was a replacement (tr., p. 206). He also testified that he was aware "in a general way" at the time he purchased the apartment at 29 East 64th Street of the possibility of being treated as a statutory resident of New York if he spent more

than 183 days in New York (tr., p. 206).

In contrast, Mrs. Tamagni, a more forthright witness than her husband and certainly less prepared by counsel, provided a broader reason for the purchase of the apartment at 29 East 64th Street:

"My dream had been to be a 'New Yorker' and virtually do what we're being accused of doing now, being a resident . . ." (tr., p. 264).

Petitioners introduced into the record as their Exhibits "12" and "13" affidavits each dated September 23, 1993 of Steven Dowd and Edward Meade, respectively, who were doormen at the "residential building located at 29 East 64th Street in New York City." Mr. Dowd stated that he "never saw Mr. Tamagni at the apartment on weekends, and only occasionally during the week" during the years at issue. Mr. Meade indicated that "it was extremely rare for me to see Mr. Tamagni on weekends" and that he "saw him only occasionally (approximately one or two days each week)" during the years at issue. Both men noted that there are only 46 apartments in the building and Mr. Tamagni is one of the very few who do not live at the building on a full-time basis.

The Division introduced into evidence as its Exhibit "R" a Statement of Personal Income Tax Audit Changes dated September 28, 1993 which asserts additional tax for 1988 and 1989 based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., if it is determined that petitioners were taxable as nonresidents only. These alternative calculations result in additional tax of \$4,659.32 (\$4,238.36, State; \$420.96, City) plus negligence penalty and interest for 1988, and of \$2,028.35 (\$1,826.78, State; \$201.57, City) plus negligence penalty and interest for 1989. Petitioners' attorney responded as follows to this alternative calculation:

"[W]e will look into the issue and we concede the partnership changes in the effort. I haven't checked the numbers but if they are consistent with the partnership audit and the other partners, we have no objection" (tr., pp. 299-300).

Petitioners did not contest the alternative calculation in their briefs.

Changes to the Transcript

With their brief dated December 2, 1993, petitioners enclosed an errata sheet listing ten

errors or discrepancies in the transcript to which petitioners and the Division agreed. The Division disagreed with four other corrections. In his letter dated December 2, 1993 transmitting petitioners' brief and the errata sheet, attorney Rosen noted "[t]o support [petitioners'] interpretation, we have enclosed a photocopy of the outline I used at the hearing for the direct examination of Mr. Tamagni." By a letter dated February 3, 1994, the Administrative Law Judge wrote the hearing reporter asking her to review the contested "errors". By a letter dated February 18, 1994, the reporter responded that she agreed with the proposed changes since she had misread certain "key strokes". By a letter dated March 16, 1994, the Division's attorney, citing the reporter's letter, noted that it "does not oppose the three enumerated amendments to the transcript." The fourth change requested by petitioners was that Mr. Tamagni's response of "Um-hmm" (tr., p. 116, lines 17-18) was an affirmative response. Since this change was, in fact, a matter of interpretation rather than a correction, the transcript was not changed.

Petitioners submitted 37 proposed findings of fact. Proposed findings of fact "1", "2", "3", "5", "10", "11", "13", "14", "17", "18", "19", "21", "22", "23", "24", "25", "26", "27", "28", "32", "33", "34", "35", "36" and "37" are accepted and incorporated into this determination.

Proposed findings of fact "4", "6", "7", "8", "9", "12", "15", "16", "20" and "29" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "4" includes the inexact statement that petitioners used their New Hampshire house "during the entire year." Mr. Tamagni testified that they rarely used it during the spring, which was a "muddy" season in New Hampshire (tr., p. 69).

(ii) The number of times petitioners went into New York City on weekends is addressed in Findings of Fact "15" and "20", which set forth Mr. Tamagni's position and Mrs. Tamagni's position, respectively, in this regard. To the extent the proposed finding of fact "6" suggests that Mr. Tamagni's testimony concerning the amount of time he spent

in New York City on weekends should prevail, it is rejected since such matter is properly resolved in the Conclusions of Law.

(iii) Proposed finding of fact "7" is rejected for the same reason that proposed finding of fact "6" was rejected.

(iv) Proposed finding of fact "8" is rejected to the extent it limits the motive for purchasing the Manhattan apartment by excluding Mrs. Tamagni's motivation for purchasing the residence and the use of the term "rarely used" is rejected since the matter of how much time petitioners spent in New York City on weekends is best resolved in the Conclusions of Law.

(v) Proposed finding of fact "9" is rejected to the extent of the use of the inexact term of "rare".

(vi) Proposed finding of fact "12" is rejected to the extent that it states that Ms. Musalo never recorded Mr. Tamagni's personal appointments, which conflicts with Finding of Fact "14". The reference to the transcript at pages 69 and 70 in support of the last sentence of proposed finding of fact "12" is incorrect since the question on pages 69 and 70 at lines 22 through 24 and 1 and 2, respectively, does not reflect what counsel apparently meant to ask.

(vii) Proposed finding of fact "15" references, in its footnote "3", June 26 and August 13, 1987 as exceptions to Mr. Tamagni's practice of generally leaving his home in New Jersey (as opposed to the New York City apartment) if a flight departed before 11:00 A.M. March 17, 1988 was another exception to this practice.

(viii) Proposed finding of fact "16" is rejected to the extent of its use of the phrase "more frequently".

(ix) Proposed finding of fact "20" is rejected to the extent that it states that petitioners' former representative provided the auditor with schedules listing dates on which Mr. Tamagni was not present in New York State/City.

(x) Proposed finding of fact "29" includes the following errors with regard to the days

outside New York State/City:

<u>Date</u>	<u>Error</u>
February 17, 1987	Petitioner was also outside New York State/City on this day (tr., p. 81).
March 25, 26 and 27, 1987	Petitioner was in Springfield on March 25, 1987 but in N.Y.C. on March 26 and 27 according to the diaries.
June 11, 1987	Petitioner was in N.Y.C. according to the diaries, and Mr. Tamagni did not suggest otherwise.
August 17, 1987	Petitioner testified that he was in Boston on the 17th, but the diaries indicate he was there on the 18th.
January 6 and 7, 1988	Petitioner was in N.Y.C. on these dates, and Mr. Tamagni did not testify otherwise.
March 17, 1988	Mr. Tamagni testified that he was in Washington, D.C. on this date, but he also indicated that he might have spent the night before and therefore the early morning of the 17th in the N.Y.C. apartment (tr., p. 128).
June 27, 1988	Petitioner was also in Seattle on this day.

July 13, 16 and 17, 1988

These dates were stipulated to by the parties as outside New York State/City, and petitioners therefore counted them twice as days outside New York State/City.

August 31, 1988

As noted in footnote "15", Mr. Tamagni testified that he arrived in Newark at 11:30 A.M. and did not recall whether he then went to his N.Y.C. office on that day.

November 30, 1988 and
December 1, 1988

These days were stipulated to by the parties as outside New York State/City and, therefore, petitioners counted them twice.

(xi) Proposed finding of fact "30" is rejected to the extent that it waffles between two days or three days as the number of days which Mr. Tamagni spent, presumably at his home in New Jersey, due to illness or an extended weekend. Such waffling reflects the somewhat speculative nature of petitioners' position in this regard which is addressed in the Conclusions of Law.

(xii) Proposed finding of fact "31" is rejected because it is more in the nature of a conclusion of law.

Petitioners have also proposed 11 conclusions of law. However, there is no requirement in the law or regulations to rule on them (State Administrative Procedure Act § 307[1]).

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that they presented sufficient evidence to establish that they were not present in New York State/City for more than 183 days during 1987, 1988 or 1989.

Mr. Tamagni's testimony concerning his whereabouts, by reference to the diaries he and his secretary maintained as well as expense reports prepared during the course of his employment, satisfied "the burden on taxpayers [under the New York Tax Law] to prove that they were not present in New York for more than 183 days" (Petitioners' brief, p. 20). Petitioners contend that

the testimony of Mrs. Tamagni, the testimony of Ms. Musalo and the affidavits of the two doormen "assure the credibility of his testimony." Petitioners point out that Mr. Tamagni testified that he and his wife "went into New York City on only the following four weekend days: October 24, 1987, March 27, 1987, June 18, 1988, and March 11, 1989" (Petitioners' brief, p. 7, footnote "4"). In the brief, they minimize Mrs. Tamagni's testimony that petitioners were in New York City on weekends five or seven times a year (staying overnight as well in the Manhattan apartment) because ultimately she stated "she really did not know for sure" (Petitioners' brief, p. 7, footnote "4"). In addition, any discrepancies in the diaries cited by the Division did not prove to be actual discrepancies. Furthermore, although certain dates in the diaries (generally weekends and holidays) were "blank days", containing no entries, petitioners' testimony was sufficient to establish that on such "blank days" they were not present in New York State/City.

Petitioners also argue that Tax Law § 605(b)(1) is unconstitutional as applied to petitioners because it is not internally consistent since petitioners are domiciled in another state:

"Although the credit that New York grants (and, by assumption, New Jersey would grant) for taxes paid to other states would offer some limit to the double taxation of the Petitioners' income, [footnote omitted] the credit would have no application to income the Petitioners derived from intangibles not employed in a business carried on in such other state. [Citation omitted.] Consequently, Petitioners would be subjected to multiple taxation on all of their income earned from stocks, bonds, and other intangibles not employed in his [sic] business. By contrast, an individual who confined all of his or her activities to a single state would be taxed only once on his or her intangible income. The imposition of a greater burden upon a taxpayer engaged in activity across state lines, as compared to a taxpayer who limits his or her activity to a single state, merely because the former has engaged in activity in more than one state is a quintessential violation of the 'internal consistency' principle" (Petitioners' brief, pp. 43-44).

In addition, petitioners argue that Article XVI (§ 3) of the New York State Constitution prohibits the Division from taxing a nondomiciliary's income from intangibles not employed in a New York business. This prohibition applies even if the nondomiciliary satisfies New York's 183-day residency test and, as a result, application of section 605(b)(1) to petitioners is unconstitutional.

Finally, petitioners maintain that if they are found to be New York residents, "the

penalties should be abated since Petitioners were not negligent in calculating their New York tax liability as nonresidents" (Petitioners' brief, p. 26). Petitioners reasonably believed that they did not spend more than 183 days in New York during the years at issue based upon the diaries and expense reports.

The Division, in its brief, notes that:

"[t]his case boils down to what evidence is sufficient to prove a taxpayer's whereabouts on any specific day in order to sustain his burden to demonstrate that he was not present within New York City for more than 183 days" (Division's brief, p. 5).

The Division maintains that the respective diaries maintained by Mr. Tamagni and his secretary were not sufficient to carry this burden without additional documentation such as bank statements, cancelled checks, utility bills for in-state and out-of-state homes and telephone bills. Furthermore, Mrs. Tamagni's testimony concerning weekend days spent in New York City contradicted that of her husband's. The Division points out that "it is encouraging to recognize that after being asked the same question repeatedly, Mrs. Tamagni's answer did not change [concerning number of weekend days spent in New York City]" (Division's brief, p. 9). The Division also rejects petitioners' attempt to count "possible sick days and possible three-day weekends" as days outside New York State/City as "not documented" and "hypothetical" (Division's brief, p. 9). The Division emphasizes that crucial testimony of Mr. Tamagni was brought out "in the form of 'yes' or 'no' answers in response to leading questions" citing the transcript at pages 51-54, 62-68, 197-204, 247-248, and 260-261 (Division's brief, p. 11).

According to the Division, penalty should be sustained because reliance "on the advice of tax professionals is not sufficient to prove that his conduct was not negligent" (Division's brief, p. 12). The Division rejects petitioners' argument that Tax Law § 605(b)(1) is unconstitutional as applied to them, citing Matter of Mallinckrodt (Tax Appeals Tribunal, November 12, 1992).

In their reply brief, petitioners argue that "any reliance on Mrs. Tamagni's testimony to establish conclusively the specific number of weekend days spent by Petitioners in New York City during the years in issue is completely misplaced" (Petitioners' reply brief, p. 10) because she ultimately testified that "she did not want to testify conclusively as to a particular number

since she did not know for certain the precise number and did not want to lie on the stand" (Petitioners' reply brief, p. 10). Petitioners also contend that Mr. Tamagni's sick days and long weekends were not "hypothetical":

"Mr. Tamagni testified, as a fact, that he actually did spend a certain number of days at home due to illness or taking a long weekend" (Petitioners' reply brief, p. 11; emphasis in original).

Petitioners argue that "[c]ontrary to the Division's contentions, Petitioners do not rely on the advice provided by tax professionals to support their claim for the abatement of penalties" (Petitioners' reply brief, p. 16). Rather, petitioners were not negligent in filing as nonresidents because they "clearly believed that they did not spend more than 183 days in New York during the years at issue, they filed their New York returns on the good faith belief that they were nonresidents and acted reasonably in the way they maintained proof of their whereabouts" (Petitioners' reply brief, p. 17).

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) defines "resident individual" as someone:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. The definition of "resident" for City income tax purposes, pursuant to the New York City Administrative Code § 11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state".

C. As noted in Finding of Fact "13", the parties stipulated that petitioners were not domiciled in New York during the years at issue. Therefore, it is only the second part of the definition of "resident individual" at issue herein.

D. The Division, in its brief, correctly noted:

"[t]his case boils down to what evidence is sufficient to prove a taxpayer's whereabouts on any specific day in order to sustain his burden to demonstrate that he was not present within New York [State and] City for more than 183 days."

The Tax Appeals Tribunal, in its recent decision in Matter of Avildsen (May 19, 1994), has made it clear that testimony alone may well be sufficient to carry this burden:

"[W]e find no support in the statute or regulations for the Administrative Law Judge's conclusion that testimony alone was insufficient as a matter of law to prove that petitioner did not spend more than 183 days in New York."

In Avildsen, the taxpayer's proof of days outside New York City consisted of (i) his secretary's testimony, which was based upon her review of desk diaries and calendars that she kept for the taxpayer, and a schedule she prepared of days in and out of New York City, (ii) airline bills and (iii) telephone and utility bills for both the taxpayer's Manhattan apartment and his Hamptons (Long Island)-area home. The actual diaries and calendars were not produced by the taxpayer.

Consequently, the Division's position that the diaries maintained by Mr. Tamagni and his secretary were not sufficient to carry petitioners' burden of proof without additional documentation such as bank statements, cancelled checks, utility bills and telephone bills is rejected. However, the Tax Appeals Tribunal in Avildsen also signalled a warning to taxpayers who might rely only on testimony and limited documentary proof:

"To prove that a taxpayer was not present in New York or New York City for more than 183 days through only testimony is a very significant task because the witness will have to convince the Administrative Law Judge that the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years, that the witness can accurately remember such details and, as well, that the witness is truthfully recounting these details."

E. In the matter at hand, unlike Avildsen, petitioners did not present only a third party to testify as to the taxpayers' whereabouts during the years at issue. Rather, Mr. Tamagni testified at great length concerning his whereabouts during the years at issue. Therefore, the issue in Avildsen concerning whether "the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years" is not germane to this proceeding (other than to the extent that Mr. Musalo, petitioner's secretary, established a reasonable basis for her awareness of Mr. Tamagni's whereabouts). However, whether Mr. Tamagni accurately remembered the details concerning his whereabouts and whether he truthfully recounted these details is at the heart of this matter.

F. It is noted that Mr. Tamagni had his own diaries as well as his secretary's diaries

(which were introduced into evidence, unlike the situation in Avildsen) to refresh his recollection in detailing his whereabouts during the years at issue. However, the diaries contained many blank days and, as noted in Finding of Fact "15", Mr. Tamagni based his testimony that his weekends were spent in New Jersey (if the diaries did not specify New Hampshire or some other place) based upon his "practice to spend my weekends with my wife at home" and not on specific entries in the diaries which noted New Jersey as his whereabouts on the weekend days.¹⁷ As noted in Finding of Fact "15", Mr. Tamagni specified only four weekend days during a three-year period when he was present in New York City: Saturday, October 24, 1987; Sunday, March 27, 1988; Saturday, June 18, 1988; and Saturday, March 11, 1989.

G. However, it is concluded that Mr. Tamagni's testimony concerning the number of weekend days he was present in New York City is outweighed by the testimony of his wife which is quoted at great length in Finding of Fact "20". It is observed that Mrs. Tamagni persevered in her position that she and her husband came into New York City five times on the weekends during each of the years at issue and spent "three, four, five" Saturday nights in their Manhattan apartment during each of the years. It was not until Mrs. Tamagni was questioned persistently by the taxpayers' attorney that she began to shift her position, and I do not give weight to her change in position: that she does not "remember that far back." Further, her clearly unscripted testimony was in marked contrast to the prepared testimony of Mr. Tamagni. In short, Mrs. Tamagni's testimony that petitioners came into New York City five times each year on the weekends and spent "three, four, five" Saturday nights in their Manhattan apartment

¹⁷As noted in Finding of Fact "14", schedules were prepared for Lazard Freres listing the whereabouts of partners on weekends. The fact that petitioners did not introduce these schedules into evidence or provide an explanation why they were not available will not be held against petitioners (see, Matter of Avildsen, *supra* [wherein the Tribunal noted that "if the Division wishes to obtain documents in the possession of the taxpayer that the taxpayer refuses to introduce into evidence, the Division can use its subpoena power"]). Furthermore, in the matter at hand, petitioners did not refuse to introduce such documents. They just did not do so.

is credible. What lends further credibility to this testimony is the nature of the apartment owned by petitioners at 29 East 64th Street: one of only 46 apartments at a prime Manhattan location, the apartment was certainly more than a simple pied-à-terre (given the fact that nearly all the tenants of the building were full-time tenants) and certainly an attractive place to spend a Saturday night after the theater or a dinner. Furthermore, the affidavits of the doormen do not alter this result. Edward Meade, one of the doormen, indicated that "it was extremely rare for me to see Mr. Tamagni on weekends." Fifteen weekends out of 156 weekends might well be viewed as an "extremely rare" presence by a doorman, especially in comparison to the other full-time residents of the building. Mr. Meade had also noted in his affidavit that "Mr. Tamagni is one of the very few who do not live at the building on a full-time basis."

Consequently, it is determined that, during each of the years at issue, petitioners spent eight weekend days in New York City: on at least three weekends they spent the Saturday night which equates to six days (because they were present in New York on Saturday and Sunday having spent the night in the Manhattan apartment) plus two additional weekend days when they were present in the City for only a day. As noted in Conclusion of Law "E", Mr. Tamagni specified one weekend day in 1987 when he was present in New York City, two weekend days in 1988 and one in 1989. Therefore, the yearly totals of days present in New York State/City specified in Finding of Fact "15", which were based on Mr. Tamagni's testimony, are properly increased by seven days in 1987, six days in 1988 and seven days in 1989, resulting in the following totals:

	Days Present in New York City	Days Present in New York State
1987	179 days	183 days
1988	195 days	197 days
1989	184 days	188 days

H. As noted in Finding of Fact "17", petitioners contend that Mr. Tamagni did not go into work in New York City due to illness one or two days a year. They also contend, as noted in Finding of Fact "18", that petitioner also took an extended weekend (in addition to the long New Hampshire weekends and holiday weekends included in Finding of Fact "15") "once or

twice". It is concluded that petitioners should be allowed one additional day outside New York based upon Mr. Tamagni's occasional sick day for each year at issue. However, no additional days outside New York should be allowed for extended weekends. In particular, it is noted that Mr. Tamagni's testimony of "once or twice" with regard to extended weekends was in response to attorney Rosen's leading question, "Once or twice?", which compounds the speculative nature of this line of questioning. Furthermore, Finding of Fact "15" discloses numerous "extended weekends" taken by petitioners during the years at issue so that Mr. Tamagni's testimony concerning additional extended weekends is decidedly more speculative than his testimony concerning sick days he might have spent at home in New Jersey. Therefore, one additional day may be subtracted from the total number of days petitioners were present in New York State/City during the years at issue, which results in the final totals:

	Days Present in New York City	Days Present in New York State
1987	178 days	182 days
1988	194 days	196 days
1989	183 days	187 days

I. Since nondomiciled taxpayers who maintain an abode in New York must be present in New York State/City for more than 183 days to be treated as residents, as noted in Conclusion of Law "A", it is determined that for the year 1987 petitioners properly filed as nonresidents of New York State/City. However, for 1988, Mr. Tamagni was present in New York State/City more than 183 days so that petitioners must file as residents of New York State/City for such year, and, for 1989, although Mr. Tamagni may properly file a nonresident earnings tax report for purposes of New York City tax, petitioners were required to file as residents of New York State because Mr. Tamagni was present in New York State for more than 183 days in 1989.

J. For 1988 and 1989, the Division may amend its answer to assert, in the alternative, additional State and City income tax for 1988 and State income tax for 1989 based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., of which petitioner John S. Tamagni was a partner. Amendments of pleadings are freely allowed so long as the opposing party has adequate notice if factual matters might be involved (see,

Matter of Clark, Tax Appeals Tribunal, September 14, 1992). In the matter at hand, as noted in Finding of Fact "23", the Division introduced into evidence a Statement of Personal Income Tax Audit Changes dated September 28, 1993 specifying the additional tax for 1988 and 1989 based upon the increase in the allocation of partnership income. Petitioners have introduced no evidence to contravene such increase. However, additional tax may be asserted under this alternative only to the extent of additional City tax of \$201.57 for 1989 because, as noted in Conclusion of Law "I", it has been determined that petitioners must file as residents in 1988 and for purposes of 1989 State income tax.

K. During the years at issue, the tax rate for the New York City nonresident earnings tax on wages was .45% and for New York City nonresident earnings tax on net earnings from self-employment was .65%. In contrast, the tax rate for New York City personal income tax was significantly higher:¹⁸

<u>1987</u>	<u>1988</u>	<u>1989</u>
\$3,371.00 plus 4.1% of excess over \$99,000.00	\$3,335.00 plus 3.5% of excess over \$108,000.00	\$3,344.00 plus 3.4% of excess over \$108,000.00

Petitioners' New York State adjusted gross income as reported by them on their respective returns was increased only incrementally as the result of the Division treating them as resident individuals of New York State/City. It is the much higher rate for New York City income tax, as compared to the New York City nonresident earnings tax, which resulted in the substantial

additional tax that was asserted as due against petitioners. Consequently, petitioners' constitutional arguments, which are directed to an alleged failure to comply with a so-called "internal consistency" test because they would be taxed more than once on their intangible income if they were taxable as resident individuals, affects only a small portion of the additional taxes asserted as due. Moreover, although petitioners contend that they are questioning the

¹⁸New York City Administrative Code § 11-1701(a)(1) sets forth the New York City income tax rates for resident married individuals filing joint returns.

constitutionality of Tax Law § 605(b)(1) and its New York City Administrative Code counterpart as applied to them, in actuality they are challenging the constitutionality on its face of Tax Law § 620(a), which allows a credit for income tax paid to another state, but which has been interpreted not to allow a credit for taxes paid on income from intangibles (see, Matter of Mallinckrodt, Tax Appeals Tribunal, November 12, 1992). Therefore, petitioners' constitutional arguments may not be addressed given the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994).

L. Petitioners have not established that negligence penalties should be abated (see, Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990). As noted in footnote "6", Mr. Tamagni's review of his tax returns before signing was unduly casual given his professional position, educational background and high income. Furthermore, petitioners have maintained a New York City apartment since 1980 or 1981 and, as noted in Finding of Fact "21", Mr. Tamagni was aware of the possibility of being treated as a statutory resident of New York if he spent more than 183 days in New York. Given such knowledge, he should have maintained better documentation of his days in and out of New York. The fact that petitioners have prevailed at hearing with regard to a part of the period at issue does not alter this result. With better documentation, petitioners might have very well prevailed during the audit stage without the time and expense that both parties incurred from the need to conduct a formal hearing.

M. The Tax Appeals Tribunal has consistently held that once a hearing is completed, additional evidence should not be admitted (see, Matter of A & J Auto Repair Corp., Tax Appeals Tribunal, May 6, 1993). The Division contests the submission, after the hearing was completed, of attorney Rosen's "photocopy of the outline [he] used at the hearing for the direct examination of Mr. Tamagni." However, Mr. Rosen submitted such document in order to support petitioners' interpretation of the transcript and not to prove facts in issue. For such limited purpose, the submission of such outline was not improper.

N. The petition of John S. and Janet B. Tamagni is granted to the extent indicated in

Conclusion of Law "I" and the Notice of Deficiency dated July 6, 1992 is to be modified to so conform. In all other respects, the petition is denied.

DATED: Troy, New York
August 25, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE